BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Billed Party Preference for InterLATA 0+ Calls	CC Docket No. 92-77

REPLY COMMENTS OF DIGITAL NETWORK SERVICES, INC. ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Digital Network Services, Inc. ("DNSI"), by its attorneys, hereby submits its reply comments on the Commission's Second Further Notice of Proposed Rulemaking ("Second Further Notice") issued in this proceeding.[1]

INTRODUCTION

DNSI is an interexchange telecommunications carrier whose services include provision of 0- transfer call services ("0- transfer services") from public telephones primarily owned by Bell Operating Companies ("BOCs") and other local exchange carriers ("LECs"). As a provider of 0- transfer services, DNSI's costs of service are not driven by commissions and other payments to premises owners or other third persons such as a typical operator service provider ("OSP"). Instead, DNSI's cost structure is dependent on other factors that are outside of its control and are in no way associated with third party payments. Such costs include the installation and maintenance of direct trucks between DNSI's point of presence and each LEC operator tandem switch and LEC 0- transfer charges.

[1] Billed Party Preference for InterLATA 0+ Calls, *Second Further Notice of Proposed Rulemaking*, FCC 96-253 (released June 6, 1996) ("*Second Further Notice*").

Because of these differences in costs of service DNSI opposes the Commission's proposal to establish rate benchmarks. Very simply, the proposed benchmarks are inadequate to allow all carriers to recover all just and reasonable costs of providing service. In addition, the setting of benchmarks at levels approximating the average price charged by AT&T, MCI, and Sprint will enable these carriers to manipulate the benchmark levels to the detriment of other OSPs. Finally, the proposed benchmarks and mandatory rate disclosure are *de facto* rate caps that violate the Communications Act and contravene the pro-competitive and deregulatory intent of the Telecommunications Act of 1996[2] (the "1996 Act").

I. The Proposed Benchmarks are Inadequate to Allow all Carriers to Recover All Just and Reasonable Costs of Providing Service

As recognized by the Commission in the *Second Further Notice*, "no single set of rate ceilings may be appropriate in all cases."[3] Some OSP service costs, particularly those associated with 0- transfer service, are not driven by commissions and other payments to premises owners or other third persons, but are instead unavoidable and beyond the control of the OSP. As a result, despite the Commission's proposal to delegate authority to the Common Carrier Bureau to reformulate the calculation of the benchmarks as necessary, the proposed benchmarks that are based on the average cost of carriers that do not incur such costs are inadequate to allow carriers that do incur such costs to recover all just and reasonable costs of providing service.

Many interLATA calls are initiated by a caller dialing the digit "0" and waiting for the LEC operator to intervene. Since the largest LECs—the BOCs—are not permitted to provide

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[2]Pub. L. No. 104-104, 110 Stat. 56 (enacted February 8, 1996).

[3]*Second Further Notice*, *supra* at ¶28. By its own language the Commission recognizes that the proposed benchmarks will function as *de facto* price caps. *See* discussion at Section III of these Comments, *infra*.

interLATA services, their operators do not provide operator-assistance for interLATA calls. Instead, a practice has developed in certain LECs' territories whereby the LEC operator will offer to transfer a caller seeking to place an interLATA call to an interexchange carrier ("IXC") operator who can arrange for billing and completion of the call. The caller is either given the choice of selecting an IXC to have the call transferred to, or if the caller does not express an IXC choice, the LEC operator will "offer" to transfer the call to a randomly selected IXC from among a list of those participating in what is commonly referred to as 0- transfer services.

As previously mentioned, the costs of providing 0- transfer services are not driven by commissions and other payments to premises owners or other third persons. Instead, the costs of providing 0- transfer services is largely dependent on unavoidable factors that are beyond the control of the 0- transfer services provider. Foremost of these costs are essential trunk lines. In order to participate in 0- transfer, an IXC must arrange for direct trunks between the IXC point of presence and each LEC operator tandem switch. These trunks, which are subject to installation charges, as well as to monthly recurring charges irrespective of usage levels, are used exclusively for the provision of 0- transfer service.

In addition to the costs of acquiring and maintaining these trunking facilities, the IXC is subject to a LEC transfer charge for each call transferred. These transfer charges are typically in the range of $.30 to $.35 per transferred call and are assessed whether or not the caller completes a call. In fact, the IXC is assessed a transfer charge once the call is transferred to its operator center even if a caller does not attempt to complete a call, or if the caller abandons the call attempt prior to completion.

The requisite trunk line and transfer charges are not the only additional costs incurred by providers of 0- transfer services. The most frequent users of 0- transfer service are callers without telephone accounts of their own. These callers generally have no preexisting

relationship with any LEC or IXC. As a result the vast majority of these calls are completed on a collect call basis. And in many cases, these callers are immigrants that speak little or no English, and often do not know the area code, or country and city code for international calls, needed to place and complete their calls.

Because of the callers' unfamiliarity with the provision of telephone service, especially long distance operator-assisted service, and with the English language, each 0- transfer call attempt usually requires extensive assistance by DNSI operators once their calls have been transferred to DNSI using the LEC 0- transfer service. As a result of the extensive assistance that is required to handle 0- transfer service calls, DNSI operators expend considerably more time assisting the caller than the average amount of time expended on a typical operator-assisted call. In fact, DNSI has determined that each 0- transfer service call attempt handled by its operators involves at least one full minute of live operator time. This is considerably higher than the industry average for all operator-assisted calls.

Again it must be emphasized that this extensive assistance is required for each attempted call, regardless of whether the caller actually completes a call. Because most 0-transfer service callers have no telephone or calling card account, calls must be sent collect or billed to a third party number. Both methods require that the billing number be validated as an active account capable of being billed. Of the calls that can be billed, many are not completed. Less than one-half of all 0- transfer service call attempts result in completed calls. However, every single attempt is subject to the LEC transfer charge, network costs, access charges, and extensive operator assistance time and costs.

As a result of these unavoidable expenses, DNSI's cost of service exceeds the industry average and would be greater than the average rates charged by AT&T, MCI, and Sprint. However, without the willingness of DNSI and other similar carriers to incur these additional

costs and handle 0- transfer service calls, many callers without their own telephones, without calling cards or credit cards, and without the ability to communicate with English speaking-only operators, would be unable to complete operator-assisted calls. For these customers telephone service would simply not be available.

The "one size fits all" approach proposed by the Commission completely fails to take into account the differences in carrier costs of service. Clearly this cookie cutter approach to regulation of the interLATA 0+ market is inefficient, outdated, and contra to the general shift away from government set prices. While the Commission explicitly recognized DNSI's concerns in its *Second Further Notice*,[4] its comments fail to adequately address the issue of higher costs of service for 0- transfer service providers. Merely delegating to the Common Carrier Bureau the authority to make "such other changes in the calculation of these benchmarks as the Bureau deems necessary to effectuate the policies established in this docket" does not resolve this issue. Instead the Commission must recognize this inherent shortcoming of the proposed benchmarks and either not implement them with respect to 0- transfer service, or at the very least, establish a specific exception for services such as 0- transfer that are subject to unavoidable and uncontrollable costs.

II. Setting the Benchmarks at Levels Approximating the Average Price Charged by AT&T, MCI, and Sprint Will Enable These Carriers, Primarily AT&T, to Manipulate the Benchmark Levels to the Detriment of the Competing Carriers

The Commission proposes to set the benchmark rate levels at 115% of the weighted average rates of AT&T, MCI, and Sprint (the "Big Three"). All three of these carriers are classified as "non-dominant" carriers. In fact, even AT&T, despite a market share of at least

[4]*Second Public Notice*, *supra* at ¶28.

60 percent, has been classified as a non-dominant carrier.[5] As non-dominant carriers each of these carriers may change its rates without limitation on one day's notice and the rates of each are presumptively lawful. As a result, these three carriers would be in a position to raise or lower their own rates without limitation.

The power of the Big Three to raise or lower their rates, against which the reasonableness of their competitors' rates are to be judged, without any scrutiny whatsoever will enable them to reduce their rates and drive the benchmarks below the cost of service of other OSPs. As a result, those carriers with higher costs of service will be forced from the market because the mandatory disclosure requirement would in effect limit the carrier's ability to charge rates higher than the set benchmarks. This is especially true for those carriers that provide 0- transfer services despite the fact that their higher rates may be both just and reasonable based on those carriers' costs of service. As discussed previously, 0- transfer service providers are already at a disadvantage because of their costs of service. This disadvantage will be exacerbated by the Big Three carriers' ability to abuse their market power and control the benchmark and thereby control the operator-assisted calling market.

While it is generally more efficient to permit the lowest cost producer to drive higher cost suppliers out of the market this is not the case in this instance. The services that the Big Three and the many other OSPs provide are not equivalent to the services provided by 0- transfer service providers. Subjecting DNSI and the other 0- transfer service providers to rate restraints that fail to account for their higher unavoidable costs of service is neither equitable nor sound public policy. The 0- transfer service carriers provide service to the poorest and most telephony unsophisticated segment of the calling market. If the 0- transfer service providers are forced

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[5]Motion of AT&T to be Reclassified as a Non-Dominant Carrier, FCC 95-427, released October 23, 1995.

from the market these callers will be severely limited in their options for obtaining telephone service.

By lowering their rates, the Big Three can drive the other carriers out of the business while at the same time increasing their market share. Once the market share is completely concentrated in the hands of the Big Three, they will then be in the position to demand a monopoly premium from all customers. And because they are individually considered non-dominant carriers their rates will be presumed lawful.

Finally, the Commission's proposed benchmarks and mandatory rate disclosure requirement implies to the public that rates above the benchmark are unreasonably high. The rate benchmarks would therefore function as *de facto* rate caps. The effect will be that callers who hear a disclosure will hang-up and use another carrier. In the case of 0- transfer service the caller merely needs to dial "0" once again and ask to be connected to another IXC. The caller can continue dialing "0" and hanging up until they do not hear a disclosure message. In the meantime, the IXCs will be assessed a transfer charge for each attempted call. This only increases the cost of service for these carriers while increasing the revenues of the LEC providing the 0- transfer service. Increasing the costs for each of these carriers will possibly drive some out of business, despite that fact that all of their costs and rates may be just and reasonable.

III. The Proposed Benchmarks and Mandatory Rate Disclosure are *de Facto* Rate Caps that Violate the Communications Act and Contravene the Pro-Competitive and Deregulatory Intent of the 1996 Act

The touchstone for determining the lawfulness of charges for common carrier services is that rates must be just and reasonable.[6] The Commission has long considered a carrier's cost

[6]Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 151 *et seq.*, § 201(b).

of service in determining whether rates are lawful. As discussed above, the setting of benchmarks at levels approximating the average price charged by AT&T, MCI, and Sprint fails to take into account the unique costs of service faced by each carrier, particularly those providing 0- transfer service. In fact, if a carrier's rates are below the benchmark the Commission proposal would accept that carrier's rates as just and reasonable without regard to the carrier's cost of service. As such, the proposed benchmarks would bear little, if any, relation to the costs incurred by some carriers. Therefore, carriers with extremely low costs of service may be charging unreasonably high rates.

More importantly, by requiring certain carriers to disclose rates at the beginning of each call while not requiring others to make a similar announcement, the Commission would be indicating to the public that the rates of the carrier making the disclosure are unreasonably high. With the obvious purpose of encouraging customers to "hang up on high rates," the Commission might as well require the message to explicitly tell the caller to hang up because they are being ripped off. By requiring all carriers with rates greater than the established benchmarks to make such a harmful announcement, without regard for the reasonableness of the carriers rates, the Commission is in fact instituting a rate cap.

The use of price caps is clearly contra to the regulatory policy that the Commission is embracing in its regulation and the Congress is mandating for the rest of the industry. It is inconceivable how not more than six months after the Congress passed the 1996 Act with a stated purpose to open markets, decrease regulation, and encourage competition, that the Commission would attempt to implement price controls and additional regulation in the OSP segment of the interexchange telecommunications market.

Finally, the Commission proposal to subject all OSP providers to rate cap regulation is completely contrary to the Commission policy that non-dominant carriers' rates are

presumptively lawful and therefore should be subject to streamlined regulation.[7] In 1989, the Commission specifically concluded that resale carriers that offer 0+ services, including OSPs, are non-dominant carriers and are properly subject to the streamlined regulatory requirements applicable to non-dominant carrier rates.[8] In the fifteen years since promulgation of the streamlined regulatory requirements, the Commission has never found a non-dominant carrier's rates to be unlawful. However, the Commission proposal would have the effect of labeling some carriers' rates as unreasonable and prescribing that the carrier charge rates at or below the benchmark, without any consideration of those carriers' costs of service.

Section 205(a) of the Communications Act provides that the Commission is authorized and empowered to determine and prescribe just and reasonable rates only after the carrier as had a full opportunity for a hearing.[9] A cursory comparison of a carrier's rates to a benchmark based on the average rates of AT&T, MCI, and Sprint clearly does not represent a full opportunity for hearing as required by Section 205 the Act. As such, the proposed use of benchmarks and requirement for rate disclosure would constitute an unlawful rate prescription in violation of Section 205 of the Act.

CONCLUSION

Based on the foregoing, DNSI respectfully urges the Commission not to establish benchmarks for the provision of 0+ service because 1) the proposed benchmarks are inadequate

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[7]*See*, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 FCC2d 1 (1980), in which the Commission determined that carriers that do not have large market shares, that do not control bottleneck facilities, and that are unable to price above cost without loss of business are non-dominant.

[8]Telecommunications Research and Action Center v. Central Corporation, 4 FCC Rcd 2157 (1989).

[9]47 U.S.C. § 205(a).

to allow all carriers, especially 0- transfer service providers, to recover all just and reasonable costs of providing service, 2) the setting of benchmarks at levels approximating the average price charged by AT&T, MCI, and Sprint will enable these carriers to manipulate the benchmark levels to the detriment of the competing OSP carriers, and 3) the proposed benchmarks and mandatory rate disclosure are *de facto* rate caps that violate the Communications Act and contravene the pro-competitive and deregulatory intent of the 1996 Act.

Respectfully submitted,

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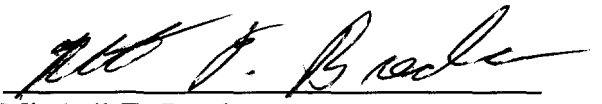
By: 

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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "*Reply Comments of Digital Network Services, Inc. On Second Further Notice of Proposed Rulemaking*" in Docket 96-77, was served this 16th day of August, 1996, upon the following:

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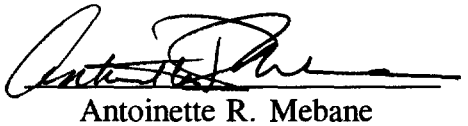

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